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CH'NG GHEE WENG & ANOR v. LEE KHOON ENG T/A PRESTIGE CONSTRUCTION

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
B MARY LIM JCA
[CIVIL APPEAL NO: P-02(NCVC)(W)-1240-07-2017]
7 MARCH 2018

C ***CONTRACT:*** *Claims – Sums due under contract – Claim for balance sum due under construction contract – Claim founded on quantum meruit basis – Whether claim maintainable in law on quantum meruit basis – Whether there was valid existing contract between parties – Whether claimant entitled to claim – Whether claim for quantum meruit based in contract or in restitution properly spelt out – Whether basis and material facts upon which quantum meruit premised on properly*
D *pleaded – Contracts Act 1950, s. 71*

By a letter of award, the appellants ('the defendants') appointed the respondent ('the plaintiff') to construct their house for the sum of RM6.8 million. According to the plaintiff, it had carried out variation works pursuant to the instructions of the architect to the value of RM1,129,182.08,
E rendering the total value of works done by the plaintiff as RM7,929,182.08. The plaintiff claimed that it had been paid the sum of RM4,861,529.26 from the bank that had provided the defendants a loan for the said project. The plaintiff commenced a claim, founded on *quantum meruit* basis, against the defendants at the High Court, for the balance sum of RM1,267,652.82 due
F under the original contract (RM138,470.74) and for variation works (RM1,129,182.08). Resisting the claim, the defendants argued, *inter alia*, (i) the claim was not maintainable in law on a *quantum meruit* basis given that there was a valid existing contract between the parties; (ii) since the plaintiff had not complied with those contractual requirements, the plaintiff was not
G entitled to its claim; (iii) the plaintiff carried out works which were not instructed by the defendants and such works caused the architect to amend plans and seek fresh approvals from the local authority; and (iv) a notice of default and a certificate of non-completion were issued before the defendants finally terminated the contract. The defendant counterclaimed for liquidated and ascertained damages at the rate of RM2,000 per day, as provided under
H the contract and damages for the works which the plaintiff failed to complete. The High Court Judge ('the HCJ') (i) dismissed the plaintiff's claim for RM138,470.74; (ii) allowed the plaintiff's claim for variation works; and (iii) dismissed the defendant's counterclaim. In respect of the variation works, the HCJ examined the claim under the principle of *quantum meruit*
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under s. 71 of the Contracts Act 1950 ('the Act'), and found (i) that the works had been carried out by the plaintiff, as evidenced by the presence of the amended construction drawings and the architect's instructions; (ii) although there were no architect's instructions issued before the variation works were carried out, Architect's Instruction No. 5 was issued to cover these works; (iii) the defendants never stopped the plaintiff from executing these works, suggesting knowledge and consent to such works; and (iv) the delay in completion was caused by factors beyond the plaintiff's control. Hence, the present appeal by the defendants for the claim of variation works allowed by the High Court.

Held (allowing appeal in part)
Per Mary Lim JCA delivering the judgment of the court:

(1) Whether the plaintiff's claim for *quantum meruit* was based in contract or in restitution must be properly spelt out. It is absolutely vital that the basis and material facts upon which the *quantum meruit* is premised must be properly pleaded. The materials facts and basis are those that would meet the elements of s. 71 of the Act, as determined in *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* ('*Siow Wong Fatt*'s case'). The elements or conditions that the plaintiff must meet in order that its claim under s. 71 of the Act may be considered the doing of the act of the delivery of goods, namely, they must (i) be lawful; (ii) done for another person; (iii) not intended to be done gratuitously; and (iv) be such that the other person enjoys the benefit of the act or the delivery. (paras 28 & 29)

(2) Based on the plaintiff's statement of claim ('the SOC'), save for seeking the liquidated sum of RM1,267,652.82 under the principle of *quantum meruit*, the plaintiff did not make any averments that met the requirements stipulated in *Siow Wong Fatt*'s case. There was no lead anywhere in the SOC of the essential elements that must be proved in a claim founded on *quantum meruit*. The one and only time that a plea of *quantum meruit* was made was when the plaintiff claimed the total sum of RM1,267,652.82 for works under the original contract and for variation works which it had carried out be awarded on a *quantum meruit* basis. (para 30)

(3) In the SOC, the plaintiff cited the letter of award as the underlying agreement between the parties. The plaintiff's own pleas acknowledged and recognised that its claim arose and was necessarily based on the contract and not in *quantum meruit*. The underlying agreement was binding on the parties and it was an agreement which the court should strive to uphold as opposed to ignoring it. From the plaintiff's own

pleadings, it may therefore be concluded that the *quantum meruit* claim was not a genuine *quantum meruit* claim. It was therefore erroneous for the HCJ to have considered the claim on a *quantum meruit* basis. (para 32)

(4) According to the HCJ, (i) there were variation works done because such works were based on amended construction drawings or plans which were not part of the original plans and specifications; and (ii) the claims for the variation works were not dependent on the terms of the original contract and did not fall to be determined under the terms of the original contract. This was erroneous. Although the variation works included works which were not part of the original scope of the works under the contract that did not necessarily mean that the contract and its terms did not apply. What the HCJ ought to have done was to examine the terms of the original contract, determine the scope of the original works, and then consider if the contract provided for variation works. There were express provisions in the contract on the matter of variation works. (paras 34 & 35)

(5) Under the terms of the contract, in order for the plaintiff to be paid for the variation works, the plaintiff had to provide proof of instruction to carry out the works and a certification of the works and value of works done. The plaintiff failed to provide both documents. (para 44)

Bahasa Malaysia *Headnotes*

Melalui satu surat award, perayu-perayu ('defendan-defendan') melantik responden ('plaintif') membina rumah mereka untuk jumlah RM6.8 juta. Menurut plaintif, kerja-kerja variasi telah dijalankan, atas arahan arkitek, bernilai RM1,129,182.08, menjadikan nilai keseluruhan kerja-kerja yang dijalankan oleh plaintif RM7,929,182.08. Plaintif menyatakan dibayar jumlah RM4,861,529.26 oleh bank yang memberi pinjaman kepada defendan-defendan untuk projek tersebut. Plaintif memulakan tindakan, berasaskan *quantum meruit*, terhadap defendan-defendan di Mahkamah Tinggi, untuk jumlah RM1,267,652.82 yang terhutang bawah kontrak asal (RM138,470.74) dan kerja-kerja variasi (RM1,129,182.08). Membantah tuntutan ini, defendan-defendan menghujahkan, antara lain, bahawa (i) tuntutan tersebut tidak boleh kekal bawah undang-undang, berdasarkan *quantum meruit*, kerana wujud kontrak sah antara pihak-pihak; (ii) oleh kerana plaintif tidak mematuhi keperluan-keperluan kontrak tersebut, plaintif tidak berhak membuat tuntutan; (iii) plaintif menjalankan kerja-kerja yang tidak diarahkan oleh defendan-defendan dan kerja-kerja ini menyebabkan arkitek perlu mengubah pelan dan memohon kelulusan baharu daripada pihak berkuasa tempatan; dan (iv) notis keingkaran dan perakuan

tak siap dikeluarkan sebelum defendan-defendan akhirnya menamatkan kontrak. Defendan-defendan menuntut balas ganti rugi yang ditentukan dan ditetapkan pada kadar RM2,000 sehari, seperti yang diperuntukkan bawah kontrak dan ganti rugi kerja-kerja yang plaintif gagal sempurnakan. Hakim Mahkamah Tinggi ('HMT') (i) menolak tuntutan plaintif sebanyak RM138,470.74; (ii) membenarkan tuntutan plaintif untuk kerja-kerja variasi; dan (iii) menolak tuntutan balas defendan. Untuk kerja-kerja variasi, HMT meneliti tuntutan bawah prinsip *quantum meruit* bawah s. 71 Akta Kontrak 1950 ('Akta'), dan mendapati (i) kerja-kerja telah dijalankan oleh plaintif, terbukti melalui kewujudan lukisan-lukisan pembangunan arkitek terpinda dan arahan-arahan arkitek; (ii) walaupun tiada arahan oleh arkitek yang dikeluarkan sebelum kerja-kerja variasi dijalankan, Arahan Arkitek No. 5 yang dikeluarkan meliputi kerja-kerja ini; (iii) defendan-defendan tidak pernah menghalang plaintif daripada menjalankan kerja-kerja ini, menunjukkan pengetahuan dan kebenaran untuk kerja-kerja ini; dan (iv) kelewatan dalam penyempurnaan disebabkan oleh faktor-faktor luar kawalan plaintif. Maka timbul rayuan ini oleh defendan-defendan untuk tuntutan kerja-kerja variasi yang dibenarkan oleh Mahkamah Tinggi.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Sama ada tuntutan *quantum meruit* plaintif berdasarkan kontrak atau restitusi hendaklah dinyatakan dengan jelas. Penting agar asas dan fakta material yang menjadi sandaran *quantum meruit* diplidkan dengan jelas. Fakta material dan asas akan memenuhi elemen-elemen s. 71 Akta, seperti yang diputuskan dalam *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* ('kes *Siow Wong Fatt*'). Elemen dan syarat-syarat yang perlu dipenuhi oleh plaintif agar tuntutannya bawah s. 71 Akta boleh dianggap sebagai melakukan tindakan penyerahan barang, khususnya, kesemuanya (i) mesti sah; (ii) dilakukan untuk orang lain; (iii) tidak diniatkan dilakukan tanpa bayaran dan (iv) sedemikian hinggakan seorang lagi menikmati manfaat tindakan atau penyerahan tersebut.

(2) Berdasarkan pernyataan tuntutan plaintif ('PT'), kecuali menuntut jumlah tertentu sebanyak RM1,267,652 bawah prinsip *quantum meruit*, plaintif tidak membuat apa-apa hujahan yang memenuhi syarat-syarat yang dinyatakan dalam kes *Siow Wong Fatt*. Tiada apa-apa dalam PT yang menunjukkan elemen-elemen penting mesti dibuktikan dalam tuntutan berasaskan *quantum meruit*. Satu-satunya masa pli *quantum meruit* dibuat ialah apabila plaintif menuntut sejumlah RM1,267,652.82 untuk kerja-kerja bawah kontrak asal dan kerja-kerja variasi yang telah dijalankan diawardkan berdasarkan *quantum meruit*.

(3) Dalam PT, plaintif memetik surat award sebagai perjanjian asal antara pihak-pihak. Pli plaintif sendiri mengakui dan mengiktiraf bahawa tuntutannya timbul dan seharusnya berasaskan kontrak dan bukan *quantum meruit*. Perjanjian asal ini mengikat pihak-pihak dan adalah perjanjian yang mahkamah harus sahkan dan bukan, sebaliknya, bantah. Berdasarkan pliding plaintif sendiri, boleh disimpulkan bahawa *quantum meruit* bukan tuntutan *quantum meruit* asli. Oleh itu, HMT terkhilaf kerana mempertimbangkan tuntutan tersebut berdasarkan *quantum meruit*.

(4) Menurut HMT, (i) terdapat kerja-kerja variasi yang dijalankan kerana kerja-kerja ini berdasarkan lukis atau pelan pembinaan terpinda yang bukan pelan dan penyataan asal; dan (ii) tuntutan-tuntutan untuk kerja-kerja variasi tidak bergantung pada terma-terma kontrak asal dan tidak terjumlah untuk diputuskan bawah terma-terma kontrak asal. Ini satu kekhilafan. Walaupun kerja-kerja variasi termasuk kerja-kerja yang bukan sebahagian skop asal kerja-kerja bawah kontrak yang tidak semestinya bermaksud kontrak dan terma-termanya tidak terpakai. Yang harus dilakukan oleh HMT adalah memeriksa terma-terma kontrak asal, mengenal pasti rangkuman kerja-kerja asal dan kemudian mempertimbangkan sama ada kontrak memperuntukkan kerja-kerja variasi. Terdapat peruntukan-peruntukan nyata dalam kontrak tentang hal perkara kerja-kerja variasi.

(5) Bawah terma-terma kontrak, agar plaintif dibayar untuk kerja-kerja variasi, plaintif hendaklah mengemukakan keterangan arahan menjalankan kerja-kerja dan pengakuan kerja-kerja ini dan nilai kerja-kerja yang dijalankan. Plaintif gagal mengemukakan kedua-dua dokumen.

Case(s) referred to:

Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal [2016] 2 CLJ 563 CA ***(refd)***

D Vanjeeswara Ayyar v. District Board, South Arcot and Others AIR 1941 Madras 887 ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Foo Sang Mee v. Ho Kiau Seng [2011] SGCA 45 ***(refd)***

Gilbert & Partners (a firm) v. Knight [1968] 2 All ER 248 ***(refd)***

Logical Operations Consortium Sdn Bhd v. Abdul Rahim Abdul Razak & Anor And Another Appeal [2018] 4 CLJ 301 CA ***(refd)***

Rabiah Bee Mohamed Ibrahim v. Salem Ibrahim [2007] 2 SLR (R) 655 ***(refd)***

Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] 1 LNS 161 PC ***(refd)***

Spatial Ventures Sdn Bhd v. Twintech Holdings Sdn Bhd [2013] 1 LNS 729 HC ***(refd)***

Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786 CA ***(refd)***

Tanjung Teras Sdn Bhd v. Kerajaan Malaysia [2015] 9 CLJ 1002 CA ***(refd)***

Trimis v. Mina [2000] 2 TCLR 364 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 71

Other source(s) referred to:
Bullen & Leake & Jacob's Precedents of Pleadings, Thomson Sweet & Maxwell, vol 1, 16th edn, pp 369-371

For the appellants - Saw Lip Khai & Wong Xian Zheng; M/s Chooi, Saw & Lim
For the respondent - Ang Khoon Cheong; M/s CP Ang & Co

[Editor's note: Appeal from High Court, Pulau Pinang; Civil Suit No: PA-22NCVC-52-03-2016 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Mary Lim JCA:

Introduction

[1] The respondent's claim for variation works was allowed by the High Court after a full trial. The appellants who were owners of the house built by the respondent appealed. After hearing extensive submissions from the respective learned counsel, we reserved decision. The following is our decision. For ease of reference, we shall refer to the parties as they were before the High Court.

Background Facts

[2] By a letter of award dated 13 March 2013, the defendants appointed the plaintiff to construct their house for the sum of RM6.8 million (the said project). Cheng Chew Giap was appointed as the architect for the said project; performing functions generally associated with a superintending officer (SO) in that the plaintiff is required to take instructions of the architect in the execution of the said project.

[3] The plaintiff claimed that it had carried out variation works pursuant to the instructions of the architect to the value of RM1,129,182.08 rendering the total value of works done by the plaintiff as RM7,929,182.08. The plaintiff claimed that it had been paid the sum of RM4,861,529.26 from the bank that had provided the defendants a loan for the said project. The claim was for the balance sum of RM1,267,652.82 due under the original contract (RM138,470.74) and for variation works (RM1,129,182.08). The whole claim is founded on a *quantum meruit* basis.

[4] The defendants disputed the claim on the basis, *inter alia,* that the claim was not maintainable in law on a *quantum meruit* basis given that there is a valid existing contract between the parties. That underlying contract required certain documents to be provided including architect's instructions

before such claims can be entertained. Since the plaintiff had not complied with those contractual requirements, the plaintiff was not entitled to its claim.

[5] The defendants further pleaded that the plaintiff had in any event carried out works which had not been instructed by the defendants; that such works had caused the architect to amend plans and seek fresh approvals from the local authority concerned. According to the defendants, even with the amendments, the plaintiff still did not complete the works despite extensions of time given by the architect. A notice of default and a certificate of non-completion were issued before the defendants finally terminated the contract. The defendant counterclaimed for liquidated and ascertained damages (LAD) at the rate of RM2,000 per day as provided under the contract and damages for the works which the plaintiff failed to complete.

[6] In response to this, the plaintiff claimed that it had, on 14 September 2015, informed the architect that it could not complete the works by 15 September 2015 as the variation works were extensive as seen from the amended construction drawings, which the plaintiff had yet to receive at that point in time. Although the plaintiff intended to carry on with the works, the plaintiff claimed that it was prevented from entering the project site by the defendants who had locked the entrance to the site. On 29 October 2015, the architect issued a certificate of non-completion dated 4 September 2015. The parties could not carry out a joint inspection of the works done for various reasons, principally because the parties could not agree on a common date(s).

[7] At the trial, it fell to be determined whether the plaintiff had in fact carried out the works as claimed; and whether the defendants were entitled to their counterclaim.

Decision Of The High Court

[8] The learned judge dismissed the plaintiff's claim for RM138,470.74 finding that there was no proof that these works had been done. According to the learned judge, the plaintiff is obliged to prove that the works were done and the value of such works. It was not sufficient for the plaintiff to rely on the total value of the contract works (RM6.8 million), claim that there is a balance sum of RM1,267,652.82 due to them because that it had only been paid a total of RM4,861,529.26. There must be proof of work done and the value of such works.

[9] However, in respect of the variation works to the value of RM1,267,652.82, the learned judge examined this claim under the principle of *quantum meruit*. According to the learned judge, these works were not under the original scope of works. But, since the defendants have received benefit from such works, these claims can be made on a principle of *quantum*

meruit under s. 71 of the Contracts Act 1950. Having been satisfied that such claims can be made in principle, the learned judge then proceeded to examine whether the claim for such variation works was proved. A

[10] The learned judge found that the works had been carried out by the plaintiff as evidenced by the presence of the amended construction drawings and the architect's instructions. The learned judge found that although there were no architect's instructions issued before the variation works were carried out, architect's instruction no. 5 (exh. P2) was subsequently issued to cover these works. The learned judge further observed that the defendants never stopped the plaintiff from executing these works, suggesting knowledge and consent to such works. B C

[11] As for the question of delay in completion of the said project, the learned judge found that the completion date had been extended to 14 September 2015; and that there was delay in completion of the works. However, the learned judge accepted the plaintiff's version of the events and concluded that the delay in completion was caused by factors beyond the plaintiff's control. Those factors included carrying out the variation works; waiting for approval from the local authority in respect of the amended construction drawings; late delivery of supplies and delay in works by other contractors engaged by the defendants. According to the learned judge, these matters were not challenged by the defendants. D E

[12] The learned judge then proceeded to award the sum claimed accepting the evidence was as per the documents found in bundle D pp. 7 to 21.

[13] For the same reasons that the learned judge allowed the plaintiff's claim for the variation works, the learned judge dismissed the defendants' counterclaim; finding that the plaintiff was not in breach of the said contract, that the defendants had failed to prove their counterclaim. F

Decision Of This Court

[14] We agree with the decision and the analysis of the learned judge in respect of the claim for the balance sum under the original contract. There is in any case, no appeal on this part of the decision. Any claim for a liquidated amount must be specifically proved. It cannot be proved by a simple mathematical calculation, deducting the amounts paid from the contract price and claiming the difference as the sum due. There must be evidence of work done and the value of such works. Since there was no proof, the claim was rightly dismissed by the learned judge. G H

[15] We are, however, of the view that having reached the above conclusion in respect of the claim for the balance sum under the original contract, the learned judge ought to have then applied the same considerations when evaluating the claim for variation works, since both I

A claims were pleaded on the same basis of *quantum meruit*. Instead, the learned judge accepted the plaintiff's contention that the claim for variation works is rightly made on *quantum meruit* basis without examining the pleadings as well as the contract documents. Had the learned judge taken that effort, Her Ladyship would readily see that the pleaded case is still based in
B contract and not on *quantum meruit* and that, the underlying contract between the parties does in fact provide for matters relating to variation works.

[16] From the perspective of the pleadings, had the learned judge paused for a moment to consider the pleadings, the learned judge would have noticed the inconsistent stand taken by the plaintiff – to, on the one hand, make a
C claim for the balance sum under the original contract while on the other, claim for that same sum on a *quantum meruit* basis. A balance sum under the original contract is necessarily a claim arising under contract; it pays utmost reliance on the contract and its terms for its efficacy and operation, especially when one sees how the plaintiff works out its claim for the balance sum. It
D was a case of taking the sum stipulated in the letter of award, deduct the total payments received by the plaintiff, finding the difference between the figures, with the difference representing the balance sum purportedly due. There was no element of *quantum meruit* involved, let alone pleaded and/or particularised in the statement of claim. The defendants had made this
E challenge in their defence and this ought to have been addressed by the learned judge.

[17] This issue will become clearer when we examine the pleadings. As far as the pleaded case is concerned, the plaintiff's case is this.

[18] At para. 3 of the statement of claim, the plaintiff pleads that it was
F appointed pursuant to a letter of award dated 13 March 2013 to carry out construction of the 3-storey bungalow/house for RM6.8 million. At para. 5, the plaintiff pleads that it was required to carry out additional variation works, which together with the original contract, amounted to the total value of RM7,929,182.08. At paras. 6 and 7, the plaintiff lists the payments that
G it has received from the defendants; first through the bank from 27 November 2013 to 10 September 2015 totaling RM4,861,529.26; and a sum of RM1,800,000 from the defendants themselves, bringing the total amount paid to be RM6,661,529.26. In para. 7, the plaintiff sets out its tabulation of claims (RM7,929,182.08), payments (RM6,661,529.26) and
H the amount due from the defendants (RM1,267,652.82). In the subsequent paras. 8 and 9, the plaintiff pleads of its unsuccessful attempts to elicit payment from the defendants while at para. 11, it pleads of its loss of RM1,267,652.82.

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[19] In our view, the claim on *quantum meruit* was not properly pleaded and therefore it was not actually available for consideration by the High Court. The Court of Appeal in *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] 9 CLJ 1002 has dealt with the issue of *quantum meruit* in fairly comprehensive detail. In that decision, the Court of Appeal concluded that "s. 71 is the statutory embodiment of the common law principle of *quantum meruit*, which provides for a just compensation as a measure of the work done as opposed to contractual damages". Section 71 of the Contracts Act 1950 reads:

> Obligation of person enjoying benefit of non-gratuitous act
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> 71. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[20] In the same decision, the Court of Appeal opined:

> [32] **Liability under s 71 is not based on any existing contract between the parties.** Rather it is based on the equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party ...
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> [33] In *Craven-Ellis v. Cannons Ltd*, it was held that:
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> > The obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law and not by inference of fact from the acceptance of service.
> >
> > (emphasis added)

[21] Similarly, in *Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal* [2016] 2 CLJ 563, this court, following the decision in New South Wales in *Trimis v. Mina* [2000] 2 TCLR 364, held that a claim based on *quantum meruit* cannot succeed where there is an existing contract between the parties:

> [51] In the alternative, the plaintiff submitted that it had executed the works for the first defendant and the defendant had enjoyed the benefit of the act of the plaintiff. Therefore, the plaintiff was entitled to claim from the first defendant for the said sum on the *quantum meruit* basis.
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> [54] *We were of the opinion that the plaintiff's claim for quantum meruit would not succeed since there was an existing contract between the parties.* In New South Wales in *Trimis v. Mina* [2000] 2 TCLR 364, the general principle was stated by Mason P as follows:

> No action can be brought for restitution while an inconsistent contractual promise subsists between the parties in relation to the subject-matter of the claim. This is not a remnant of the now discarded implied contract theory of restitution. The proposition is not based on the inability to imply a contract, but on the fact that the benefit provided by the plaintiff to the defendant was rendered in the performance of a valid legal duty. Restitution respects the sanctity of the transaction, and the subsisting contractual regime chosen by the parties as the framework for settling disputes. This ensures that the law does not countenance two conflicting sets of legal obligations subsisting concurrently. *If there is a valid and enforceable agreement governing the Claimant's right to payment, there is neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration.*
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> (emphasis added)

[22] We see similar views expressed in *D. Vanjeeswara Ayyar v. District Board, South Arcot and Others* AIR 1941 Madras 887; *Gilbert & Partners (a firm) v. Knight* [1968] 2 All ER 248; and *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786; [2009] 2 MLJ 546.

[23] In *D. Vanjeeswara Ayyar v. District Board, South Arcot and Others*, Horwill J opined:

> The principle of *quantum meruit* is often applied where for some technical reason a contract is held to be invalid. Under such circumstances an implied contract is assumed, by which the person for whom the work is to be done contracts to pay the person who does work reasonably for the work done. **There is no room however for an implied contract where there is an express contract in existence.** Where, by the terms of the contract, the person who does the work agrees that he is not entitled to any remuneration unless the work has been check-measured, then, clearly, he cannot claim for any work that has not been check-measured. (emphasis added)

[24] In the case of *Gilbert & Partners (a firm) v. Knight*, the plaintiff was a surveyor who had agreed to prepare drawings, arrange tenders and supervise works relating to alteration for a fee of £30. The cost of the works were estimated at about £600. The defendant ordered extra work done and this brought the total costs to £2,283. While the work was being executed, the plaintiff did not inform the defendant that he would require further fees. The plaintiff's claim for a reasonable sum on a new implied contract under the principle of *quantum meruit* was disallowed. The court held that the plaintiff was bound by the existing agreement to perform the services for £30 and nothing more. Davies LJ expressed the following views on *quantum meruit*:

> In order to make a person liable on a *quantum meruit* there has to be a necessary implication that the person liable is agreeing to pay. In the ordinary way if one employs a professional man to give professional services it is a necessary implication, unless anything to the contrary is expressly said, that the employer (to use that word) will pay a reasonable remuneration for those services. But in this case the cardinal point is that there had been this previous agreement to do some work for a lump sum of £30, and I for myself cannot see that there is any necessary implication that, when the work was going to be extended, or increased, in the absence of any express mention of it the defendant should be liable to make any further payment to the plaintiffs. If Mr. Tyrrell had said, in 1966, that he had only agreed to do the other work for £30, and that if the defendant wanted him to do the extra work he would have to have a further figure or scale fees, the defendant (this is pure speculation) might have done one of two things. She might have said that if that was going to be added to the cost of it she was not going on. Alternatively, she might have said that there was the builder, who, no doubt would be very pleased to do this extra work, and that she would carry on with the builder without Mr. Tyrrell's intervention at all. What she would in fact have said we do not know.
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> Like Harman, LJ, I do not quite agree with the ground on which the county court judge based his decision; but in essence I think that it was right and that he reached the right conclusion on the issues in the case. Sympathy no doubt one may have for the plaintiffs; but, after all, they have only themselves to blame for undertaking this extra work without specifically mentioning that they proposed to charge, if they wanted to do so. I think it is very likely that the defendant, in her letter of Nov. 22, 1966 (which Harman, LJ, has read), when she was presented with this bill, was quite right in saying: "It would appear that this letter (that is the letter of Aug. 25, 1965) has escaped your attention." Mr. Tyrrell had probably forgotten all about his lump sum agreement and thought that he was working all the time at the scale fee. I agree with what Harman, LJ, has said and that this appeal fails.

[25] The decision in *Gilbert & Partners* was cited with approval and followed by the Court of Appeal in *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786; [2009] 2 MLJ 546. In this decision, the Court of Appeal said that in a *quantum meruit* claim, "the appellant contractor is seeking not a precise sum of money nor a sum representing the general damages incurred by the appellant contractor as a result of some wrongful act on the part of the respondent employer. Rather the appellant contractor is seeking a sum that will provide the appellant contractor with the value of what the appellant contractor has done for the respondent employer. And this is usually calculated by reference to the market price or value of the services (see JW Carter, *"Ineffective Transactions,"* in PD Finn, ed., Essays on Restitution (North Ryde, NSW The Law Book Company Limited 1990, 206 at 235-40)".

[26] At para. 40 of the decision, the Court of Appeal added how a *quantum meruit* claim may arise:

> [40] However, there may be a *quantum meruit* claim in the following situations:
>
> (a) when there is an express agreement to pay a reasonable sum;
>
> (b) when no price is fixed (thus, if the contractor does work under a contract express or implied and no price is fixed by the contract, the contractor is entitled to be paid a reasonable sum for his labour and the materials supplied (*Moffatt v. Andrew Laurie & Anor* [1855] ER 139; 15 CB 583; *Turriff Construction Ltd and Turriff Ltd v. Regalia Knitting Mills Ltd* [1972] 9 BLR 20; 222 EG 169; [1972] EGD 257; and *Holland Hannen & Cubitts (Northern) Ltd v. Welsh Health Technical Services Organisation & Ors* [1981] 18 BLR 80);
>
> (c) in a *quasi*-contract situation (a classic example would be when work is carried out while negotiations as to the terms of the contract are proceeding but agreement is not reached upon essential terms, the contractor is entitled to be paid a reasonable sum for the work carried out (*Trollope & Coils Ltd and Holland & Hannen and Cubitts Ltd, Trading as Nuclear Civil Constructors (a firm) v. Atomic Power Constructions Ltd* [1963] 1 WLR 333; and *Peter Lind & Co Ltd v. Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234);
>
> (d) when work is performed outside a contract (thus, in a situation where there is a contract for specified work but the contractor does work outside the contract at the employer's request the contractor is entitled to be paid a reasonable sum for the work outside the contract on the basis of an implied contract (*Alexander Thorn v. The Mayor and Commonalty of London* (1875-1876) LR 1 App Cas 120 at p 127 (H L); *Parkinson (Sir Lindsay) & Co Ltd v. Commissioners of Works* [1949] 2 KB 632 (CA); *Greenmast Shipping Co SA v. Jean Lion Et Cie SA (The 'Saronikos)* [1986] 2 Lloyd's Rep 277; and *Cana Construction Co v. R* [1974] SCR 1159; 37 DLR (3d) 418, Supreme Court of Canada); and
>
> (e) when work is done under a void contract (this envisages the situation where a contractor carries out work or renders services under a contract subsequently found to be void, the contractor is entitled to a *quantum meruit* for the work or services (*Craven-Ellis v. Canons Ltd* [1936] 2 KB 403 (CA); and *Rover International Ltd & Ors v. Cannon Film Sales Ltd* [1989] 1 WLR 912 (CA)).

[27] Therefore, *quantum meruit* claims are claims which are either provided for under the contract but no amount save an agreement to pay a reasonable sum is specified, in which case the terms under the contract must be abided, or in restitution – see *Foo Sang Mee v. Ho Kiau Seng* [2011] SGCA

45 applying *Rabiah Bee bte Mohamed Ibrahim v. Salem Ibrahim* [2007] 2 SLR (R) 655. In the case of the former, the claim is based on a contract but where there is no provision on the quantum of remuneration. In the second case, there is no contract at all. The decision of the Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 deals with the *quantum meruit* claims arising under the law of restitution.

[28] Whether the plaintiff's claim for *quantum meruit* is based in contract or in restitution must therefore be properly and clearly spelt out. In either case, it is absolutely vital that the basis and material facts upon which the *quantum meruit* is premised must be properly pleaded; otherwise how is the court to make a proper decision on the applicable law and on the facts.

[29] The material facts and basis are those that would meet the elements of s. 71 of the Contracts Act 1950, as determined in the Privy Council decision of *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] 1 LNS 161; [1967] 2 MLJ 118, which decision was followed in *Tanjung Teras*. There are four elements or conditions that the plaintiff must meet in order that its claim under s. 71 may be considered, that is, the doing of the act or the delivery of the goods:

(i) must be lawful;

(ii) must be done for another person;

(iii) must not be intended to be done gratuitously; and

(iv) must be such that the other person enjoys the benefit of the act or the delivery.

[30] From the statement of claim as set out earlier, save for seeking the liquidated sum of RM1,267,652.82 under the principle of *quantum meruit*, the plaintiff does not make any averments that meet the requirements stipulated in *Siow Wong Fatt*. There is no plea anywhere in the statement of claim of the essential elements that must be proved in a claim founded on *quantum meruit*. The one and only time that a plea of *quantum meruit* is made is in prayer (a) of the reliefs sought, where the plaintiff claims the total sum of RM1,267,652.82 for works under the original contract and for variation works which it had carried out be awarded on a *quantum meruit* basis.

[31] We are of the view that there must be pleas in the statement of claim that signify these essential elements – see *Bullen & Leake & Jacob's Precedents of Pleadings* (pp. 369-371, vol. 1, 16th edn, Thomson Sweet & Maxwell). A plea of *quantum meruit* in the remedy sought from the court, that the plaintiff be awarded a specific sum of money on the basis of *quantum meruit*, does and cannot, without more, mean that the claim is a genuine *quantum meruit* claim. We are of the view that it is not and it is gravely insufficient to place the issue before the court for determination.

[32] A perusal of the pleaded claim actually yields a different result in that the plaintiff, quite clearly, cites the letter of award as the underlying agreement between the parties. The plaintiff's own pleas acknowledge and recognise that its claim arises and is necessarily based on the contract (letter of award, the construction agreement and by implication the standard PAM contract) and not, in *quantum meruit*. That underlying agreement is binding on the parties and it is an agreement which the court should strive to uphold as opposed to ignoring it, as was indirectly urged upon the High Court in the present appeal. From the plaintiff's own pleadings, it may therefore be concluded that the *quantum meruit* claim is not a genuine *quantum meruit* claim. It was therefore erroneous for the learned judge to have considered the claim on a *quantum meruit* basis.

[33] Even on the principle of *quantum meruit*, the learned judge erred in the appreciation of what variation works are and how such works are to be treated and evaluated. The learned judge found that variation works had been carried out by the plaintiff and gave judgment on the full sum for such works, as claimed.

[34] According to the learned judge, there were variation works done because such works were based on amended construction drawings or plans which were not part of the original plans and specifications. For that reason, the claims for the variation works were not dependent on the terms of the original contract ("tidak bergantung pada kontrak di antara plaintif dan defendan-defendan") and did not fall to be determined under the terms of the original contract ("tidak tertakluk kepada kontrak asal").

[35] With respect, that is erroneous. Although variation works include works which are not part of the original scope of the works under the contract that does not necessarily mean that the contract and its terms do not apply. What the learned judge ought to have done was to examine the terms of the original contract, determine the scope of the original works, and then consider if the contract provided for variation works. If so, what were the terms? Had the learned judge done that, the High Court would have found that although variation works are works in addition to or different from the original works which the plaintiff had agreed to do, such works were anticipated under the contract. There are express provisions in the contract on the matter of variation works for instance, cls. 1.1, 2.1.3 and 4.1 in the construction agreement.

[36] It is not in dispute that the contract between the parties subsists in the letter of award dated 13 March 2013 (including the quotations issued by the plaintiff) read together with the construction agreement dated 14 August 2013 which was subsequently executed between the parties – see pp. 531 to 567 of record of appeal jld. 2/3). Further, according to the letter of award,

the contract is "awarded based on the Agreement and Conditions of Building Contract – Private Edition (Without Quantities) Edition 2006, issued under the sanction and approval of Pertubuhan Arkitek Malaysia (PAM) with amendments and amplifications as detailed in Schedule of Work No. 1 – Preliminaries and General Conditions". That would mean that the standard terms found in that Agreement and Conditions of Building Contract – Private Edition (Without Quantities) Edition 2006 are to be read together with the letter of award and the construction agreement. The standard form PAM contract that is applicable here, if it had been examined, contains provisions on variation works – see cl. 11.

[37] The works to be undertaken by the plaintiff in the instant appeal involved the construction of a mansion, described as the construction of a 3-storey building or house located on the plot or the subject property, that is:

> the works of setting up of build platform, constructing and completing the Building in accordance with this Contract and the Drawings and the Building Specification subject to variations, amendments, changes, alteration as may be required by the architect and/or appropriate authority of which are annexed herein in Third Schedule.

[38] The "building" which the plaintiff was to build and complete is also defined in the construction agreement, and it means:

> the three (3) storey house on the Plot, the Building Specification and drawing subject to variation, amendment, changes, alteration as may be required by the architect and/or appropriate authority of which are annexed herein in Third Schedule respectively.

[39] Even cl. 4.1 of the contract acknowledges that where there are variation works, the employer, the defendants in this case, "shall pay to the contractor the sum stated in the s. 6 of the First Schedule, the contract sum shall include all cost of materials or goods, construction cost and any other costs incurred in relation to the works payable at the times and in the manner prescribed in the Second Schedule and such other sums as shall become payable as the result of variations to *(sic)* determined in accordance with this agreement."

[40] Since the contract and the construction agreement as well as the PAM standard form contract do provide for variation works, the plaintiff's claim must be treated and examined under those terms. The plaintiff did not lead any evidence of its case under the contract and in fact did not proceed under those terms. On that basis, the decision of the learned judge is erroneous.

[41] Further, whether on a *quantum meruit* or a contractual basis, the High Court should also have been properly satisfied that the variation works that were carried out by the plaintiff were proved to be of the value or sum

claimed. In *Spatial Ventures Sdn Bhd v. Twintech Holdings Sdn Bhd* [2013] 1 LNS 729; [2014] 8 MLJ 38, where liability had been conceded and the issue was about the assessment of damages, the court was in agreement with the defendant that in a *quantum meruit* claim, it was incumbent on the plaintiff to nevertheless prove the quantum or amount of work done and the value of such work done. In order to prove its claim, there must be evidence led of "the market price or value of the services" done by the plaintiff, as expounded by the Court of Appeal in *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungal Glugor Bhd* [2009] 1 CLJ 786; [2009] 2 MLJ 546.

[42] In *Logical Operations Consortium Sdn Bhd v. Abdul Rahim Abdul Razak & Anor and Another Appeal* [2018] 4 CLJ 301; [2017] 1 LNS 1333, this court similarly held that in discharging its burden to prove a reasonable sum for work done premised on *quantum meruit*, there must be evidence to establish *inter alia* "the market value of comparable or similar works ... at the very least, the usual sum imposed by the plaintiff on its other clients for similar services rendered." In this case, the plaintiff must offer such evidence or at the very least, offer evidence of what the contract rates are in relation to such services. The plaintiff did nothing other than to tender progress claim no. 13 – see pp. 603 to 623 of record of appeal.

[43] The learned judge expressed that there was evidence that such works were done "melalui dokumen pada Ikatan D ms 7-21." We have examined those documents and we cannot agree with the learned judge that these pages or for that matter, any of the documents tendered at the trial, represented the necessary evidence of variation works done and that the value of such works is as claimed by the plaintiff. Pages 7 to 21 are actually progress claim 13, and nothing more. There were no documentary evidence before the court to show that the variation works to the value of the sum claimed, were in fact carried out. Timesheets, delivery orders, purchase orders, invoices and such other evidence of work done and the value of such work ought to have been tendered. The same documents which were accepted by the learned judge as evidence of work done and value of work done were rejected by the architect at the material time on the basis that there was a lack of supporting documents.

[44] Under the terms of the contract, in order for the plaintiff to be paid for the variation works, the plaintiff had to provide proof of instruction to carry out the works and a certification of the work and value of work done. The plaintiff failed to provide both documents. All that the plaintiff did was to submit progress claim no. 13 and nothing more. The architect, SD1 gave his reasons for his refusal to certify. The architect had also explained that the variation works were done without any instructions from him before they were carried out. But, because the as-built drawings differed from the

approved plans meant that the certification of fitness could not be obtained, the architect subsequently issued Al No. 5 to cover the variation works already done by the plaintiff. As for the non-certification, there were no supporting documents for the claim, neither was there any verification from a quantity surveyor of the work done.

[45] SD1 plays an independent role under the contract and this is not disputed. In the administration of the project, and in decisions that the architect has to make in relation to time extensions, instructions and certifications, the architect is independent. Thus, the architect's reasons ought to have been examined by the learned judge. Had the learned judge examined the reasons, the learned judge would have found that there was still a lack of supporting documents before the court to prove work done and the value of such work.

[46] When we examine the evidence in support of the plaintiff's claim for variation works, we actually find that the claims are inherently improbable. In progress claim no. 13, the plaintiff claims to have completed all variation works. However, there is admission of delay in the completion of the works or the contract – see para. 6 of the reply and defence to the counterclaim that is filed by the plaintiff at p. 57 of the record of appeal, vol. 1. This implicitly means that the variation works could not have been completed warranting the amounts claimed by the plaintiff. This vital inconsistency was also not addressed by the learned judge.

[47] Consequently, we are constrained to find that the learned judge has erred in allowing the claim for the variation works. The learned judge failed to properly satisfy herself on the evidence of the plaintiff's claim. Since there was a palpable lack of evidence, the claim ought not to have been allowed.

[48] As for the counterclaim, there is evidence that the delay in the completion was due to a multitude of reasons, involving both parties and others. The defendants could have chosen to reject the variation works and insist that the works be done according to the originally approved plans and drawings. Since the defendants accepted the changes and submitted the amended construction drawings for approval to the local authority, the existence of the variations is really no longer an issue. As the delay in completion was not entirely the fault of the plaintiff, the defendants are therefore not entitled to impose LAD under the terms of the contract. The counterclaim was therefore rightly dismissed.

Conclusion

[49] For the above reasons, the defendants' appeal is therefore allowed in part.